UPREME COURT. U. S.

No. 891

APR 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Petitioner,

against

HOTEL, MOTEL AND CLUB EMPLOYEES UNION, LOCAL 6.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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Opinions Below

The opinions below are adequately set forth in the brief for the Secretary of Labor.

Jurisdiction

The jurisdictional requisites are adequately set forth in the brief for the Secretary of Labor.

Questions Presented

1. Where a local union, with over 26,000 members employed by more than 200 employers throughout the New York Metropolitan Area, which has assets of over $2,000,000 and shares responsibility for administering over $30,000,000

of pension, welfare and medical funds, conducts an election under a by-law, adopted through democratic procedures in an effort to assure the competency of top officers, requiring that candidates for such offices have had previous service in union bodies which provide broad experience in union affairs, and where in such election there was a pool of over 1,700 persons eligible to run for such offices (averaging 55 eligibles for each office), did the Court of Appeals err in holding that such by-law requirement is a reasonable qualification upon candidacy for union office within the meaning of Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959?

2. If the first question is answered in the affirmative, should the District Court's holding that "the existence and enforcement of the by-law could not have affected the outcome of the election" be set aside where it was predicated on findings by the District Court that the candidates of the opposition party in the election, who campaigned vigorously for their slate, were defeated by a 7 to 1 margin in a free and fair vote of the membership and that "the primary reason for the heavy vote in favor of the administration was the lack of any real grievance or issue against the union management"?

3. Whether alleged violations of the Act, about which no union member complained or exhausted internal union remedies, which were entirely unrelated to the alleged violations complained of, and which the union had no opportunity to consider or to redress in connection with any member's complaint to it, were properly stricken from the Secretary's complaint and excluded from the case.

Statutes Involved

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter sometimes called the "Act" or the "LMRDA") are set forth in the appendix to the brief for the Secretary of Labor.

Statement

I

The Union and its Structure

The Respondent, Hotel, Motel and Club Employees Union, Local 6 (hereinafter called the "Union" or "Local 6") was chartered on February 4, 1938. Its jurisdiction covers hotel, motel and club employees working throughout the City of New York, and its more than 26,000 members (A.26, 50) range from the very highly trained to the unskilled (A.51-52). It is the largest single local union in the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (A.250, 290). Practically every hotel, motel and club of any size in New York City is a signatory to a collective bargaining agreement with the Union (A.167), and its members, by virtue of such agreements, enjoy the highest standard of wages, hours and working conditions of hotel employees anywhere in the United States (A.169-177).

As of June 30, 1966, the surplus of assets over liabilities of Local 6 was $2,380,875.38 (A.320). In addition, the Union, through its representatives, participates in the administration of various welfare, pension and medical funds which have combined assets in excess of $30,000,000 (*ibid.*).

The large membership of Local 6 and the employment of its members in hotels which operate 7 days a week around the clock make it impossible to hold general membership meetings which are representative of the whole (A.92). Because of this fact and because the members are employed in shops scattered throughout the New York Metropolitan Area, the structure of the Union—as established by its By-Laws—is quite complicated, and has been revised from time to time over the years (A.180).

"The basic element in the Union is the unit or shop in the hotel or club where the members of a particular craft work. Each dining room or kitchen, for example, is a

separate unit. Each unit elects a "department delegate" who cooperates with officers of the Union in the handling of grievances and other matters affecting members in his unit . . . " (A.201, 291-292). The department delegates in each hotel comprise a shop committee headed by a shop chairman (A.54-55).

The hotels are grouped together in geographical districts,* each governed by a District Council (A.201, 292). Each District Council is composed of the Vice President of the district, the Business Agents working within the district, the members of the Assembly elected by the members employed in the district, and the Department Delegates elected in the various hotels located in the district (A.201-202). District Council meetings, which are chaired by the Vice President (A.202), deal with district and local shop problems (A.55-56).

The administrative division of the Union into small units or "shops" each of which elects its own delegate has as one of its principal purposes to involve as many Union members as possible actively in the business and affairs of the Union (A.53-56)—something which, in so large a Union, can be achieved only through the use of small basic units. To deal effectively with the broad problems involved in administering contracts and negotiating grievances with large units such as hotels and groups of hotels, it was necessary to organize the delegates elected by the individual shops into hotel-wide shop committees and into District Councils, and to provide them with the expert representation furnished by paid and experienced organizers and negotiators—i.e., the Business Agents and the Vice Presidents (A.55-56). Each of these professionals works as part of the District Council of his district with the Department Delegates elected in the hotels in the district (*ibid.*). This serves the double purpose of bringing the rank and

* The Clubs as a group constitute a distinct district not based on geographical considerations.

file members into the work of the District Councils and of establishing a forum in which the Vice Presidents and the Business Agents can be held to account to the membership they serve (*ibid.*, A.85).

Formerly the highest legislative body of the Union, which acted as the representative of the members in a situation where the holding of membership meetings was not practicable (A.290-291) was the Shop Delegates Council, which consisted of all the "department delegates" elected by each of the individual "units" or "shops" in the hotels throughout the city. However, as the Union grew, the Shop Delegates Council (which grew to some 1400 members) became too large and unwieldy to deal effectively with the Union's affairs (A.291). And so it was abolished in 1951 and the Assembly was established (with one delegate elected for every 75 members), so that the membership—through their duly elected representatives—would be able to pass effectively upon fundamental union policies (*ibid.*).

The Assembly is now the legislative body of the Union (A.209). Its delegates are elected by districts (A.203), but some geographical districts are subdivided into election districts established by the Assembly prior to each election. "In general, one delgate is elected for each 75 members in the district; there are by-law provisions to see that delegates are elected from the various departments in proportion to department membership and not too many from any one hotel.* The Assembly meets at least quarterly and each year must meet for a full day. The general officers, the vice presidents and the business agents are auto-

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* "The organizational novelty of Local 6 is that, while each craft has its own unique traditions, interests and problems, Local 6 includes several different crafts and negotiates with employers for them all. By means of by-laws and otherwise, however, care is taken that each craft (department) in Local 6 has proportional representation in the Assembly and other Union activities. Care is similarly taken that the employees in any one hotel do not acquire a dominant influence." (A.292)

matically members of the Assembly" (A.292). At these meetings the Assembly delegates discuss and vote upon questions related to contract enforcement and negotiation, labor legislation, elections, departmental problems, By-Law amendments, financial reports, committee appointments and reports, organizational drives and reorganization of districts, apprenticeship programs, and officer training schools (A.82-88).

Assembly members gain wide experience and knowledge of union affairs not only through participation in the meetings of the Assembly itself, but also through the other union activities in which they participate by virtue of their positions as Assembly members. Delegates to the Assembly are automatically members of the District Council. They also participate in the work of the various union-wide committees—e.g., the Department Committees, the Wage Negotiating Committee, the Grievance Committee, the Finance Committee, the By-Laws Committee and many others (*ibid.*). Through service on these committees, Assembly delegates participate in the most important functions of any trade union, i.e., the negotiation of wages, hours and working conditions, the handling of union finances, processing of grievances and the like (*ibid.*).

The Executive Board of the Union consists of the members of the Administrative Board and, in addition, representatives of the various craft departments of the Union elected by the Assembly from among its own members in proportion to the number of members in each department (A.203). The Executive Board, which meets monthly, acts as the general governing body of the Union between meetings of the Assembly (A.209).

The Administrative Board of the Union is composed of the General Officers, the Vice-Presidents and the Delegates to the New York Hotel and Motel Trades Council (A.202). This Board meets weekly and acts as the general governing

body of the Union between meetings of the Executive Board (A.209).

The Union has 4 General Officers: President, Secretary-Treasurer, General Organizer and Recording Secretary (A.200). Only these officers and the delegates to the International Convention of the International Union are elected on a city-wide basis (A.187, 205). The Vice-Presidents and the Business Agents are elected by the members of the various districts on a district-wide basis (A.205).

II

The Previous Service Requirement

The General Officers, the Vice-Presidents and the Business Agents are the Union's paid officers and are the persons principally charged with the day-to-day responsibility of running the business and affairs of the Union, of negotiating and enforcing collective bargaining agreements, of handling grievances, and of conserving the Union's assets.

The By-Laws of the Union have long provided that in order to be eligible to run for the position of General Officer, Vice-President or Business Agent a candidate must have had previous service as a member of another Union body (A.241).

This eligibility requirement was first adopted at the Union's second constitutional convention which was held in 1941 (*ibid.*). At that time the Union's membership had sky-rocketed from 446 in 1938 to more than 15,000, and it was clear to the Convention Delegates that the "town meeting" approach to government was no longer practical or possible. The Convention recognized that the Union required intelligent, and above all, experienced leadership. Accordingly, the right to run for paid office was limited to those persons who had served on the Executive Board or on the then existing Shop Delegates Council (*ibid.*).

In 1951 when the Shop Delegates Council was abolished and was replaced by the Assembly, membership in the Assembly was added as a basis for qualification (A.207, 210, 211).

The By-Law adopted in 1951 and in force at the time of the May, 1965 election reads as follows:

> "Section 7. Eligibility to be a Candidate for and to Hold Office in the Union.
>
> "a. With respect to membership in the Union. In order to be eligible for nomination as an officer, a candidate must possess the following qualifications: (1) He must be a member of the Union in continuous good standing for a period of two years immediately preceding his nomination; (2) He must be a member of either the Assembly or the Executive Board, or else, at some time in the past, have served at least one year on either the Executive Board, the Assembly, or the old Shop Delegates Council. In order to be eligible for nomination as a member of the Executive Board, as a delegate to the Assembly or as a department delegate, a candidate must be a member of the Union in continuous good standing for a period of at least one year immediately preceding his nomination." (A.207) *

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* The District Court and the Secretary refer to the foregoing requirement as a "prior office-holding requirement". This is a misnomer which might well cause confusion by suggesting that office-holding is a closed circle in which the only way to become qualified for office is to have held prior office. The fact is that the only "officers" subject to the qualifications imposed by sub-divisions (1) and (2) quoted above are the *paid officers* of the Union, i.e., the General Officers, the Vice Presidents and the Business Agents. Members of the Assembly and of the Executive Board are not "officers" within the meaning of the section, which explicitly provides that the only qualification for holding such positions is a year's membership in good standing—a qualification which, as Judge Wyatt pointed out (A.308), no one has suggested is unreasonable.

III

The Election

In May of 1965, the Union held a general election. A month before the election, upon due notice, a special meeting of the Assembly was held for the purpose of nominating candidates for the 4 General Offices and 10 delegates to the Convention of the International Union (A.298), who were the candidates to be voted upon by the entire membership. The meeting of the Assembly was open to all members, any member present could nominate and all nominations were accepted (*ibid.*).

Nominations of candidates for Vice Presidents, Business Agents and Assembly Delegates, who were to be elected on a district-wide basis, were made by any member desiring to do so at nomination meetings held on due notice in each district (*ibid.*).

Under the By-Law setting forth the qualifications for paid office, at least 1,700 members were eligible to run for the 31 paid offices up for election (A.297). Of these 1,700 members, not more than some 30-odd were paid Union officers at the time of the election. There were thus approximately 55 persons eligible to run for each office, practically all of whom were rank and file members.

A group within the Union known as the Administration Party (the party to which the present officers of the Union belong and which had been successful in prior elections) nominated a full slate of candidates, all of whom, it is uncontroverted, had the qualifications for office-holding required by the By-Laws (A.299-300).

Another group within the Union, known as the Membership Party, placed in nomination various candidates for paid office and for International Convention Delegate (A.187-188, 212 *et seq.*). When the records of the nominees were checked on behalf of the Election and Objections Com-

mittee, it was found that certain of the nominees of the Membership Party did not have the qualifications required by the By-Laws to run for the offices for which they had been nominated (A.212-217). These nominees were notified to appear before the Election and Objections Committee and upon appearing were questioned as to whether or not they had the required qualifications. It is uncontroverted that each admitted that he did not have the qualifications for nomination required by the Union By-Laws (*ibid.*).

There were at issue in the election altogether 31 paid offices to which the qualification was applicable: the 4 General Offices for which the entire membership voted, and the 27 positions of Vice-President and Business Agent which were voted for by the members of the respective districts (A.188, 207). There were also at issue the positions of 10 Delegates to the International Convention which were voted for by the entire membership at large, but which were not subject to the By-Law qualification (A.188, 212 *et seq.*).

The Membership Party nominated a candidate for each of the 4 General Offices and 13 candidates for the 27 positions of Vice-President and Business Agent. Its candidate for Secretary-Treasurer and 8 of its candidates for Vice-President or Business Agent were found to be disqualified for want of previous service on the Assembly, the Executive Board or the Shop Delegates Council. Its candidate for Recording Secretary and 3 of its candidates for Vice-President or Business Agent were found to be disqualified for want of 2 years' membership in good standing (A.212-217).

Two Membership Party candidates were qualified and ran for General Office and two of its candidates were qualified and ran for Business Agent (A.189). Eight Membership Party candidates, including the two who had been disqualified to run for General Office, ran for Delegate to the International Convention (*ibid.*). Thus, all four nominees of the Membership Party for General Officer appeared on the ballot as candidates for positions voted on by the full membership (A. 225-239).

Both the Administration Party and the Membership Party campaigned vigorously throughout the Union (A.148-149, 277-280). Each campaigned for votes on a slate basis (A.148). Literature was distributed on behalf of both parties (A.277-280). The Membership Party held open meetings three times a week (A.148, 278) and distributed leaflets inviting all members of the Union to

> "Come And Meet Your Candidates At Our Campaign Headquarters, Hotel Woodstock, 127 West 43rd Street, N. Y. C. Every Mon., Tues. and Wed. From 3 p.m. to 9 p.m." (A.278)

The nominees of the Membership Party who had been declared ineligible stated, at meetings and in widely distributed literature

> "We urge you, though some of our names do not appear on the ballot, to vote row B all the way because we are running all the way" (A.280).

The election was held on May 19, 1965. 11,254 members of the Union voted (A.282)—approximately the same percentage of members that voted in previous Union elections, including the election of 1951 which was the most hotly contested in the Union's history and in which almost 3 full slates of candidates ran (A.181, 282).

The candidates on the Administration Party slate ran on Row A, the practice in the Union being (as in New York State elections) to place the incumbent party on the first line of the ballot. The candidates of the Membership Party, running on a single slate as requested by them, appeared on the second line of the ballot, or Row B (A.212-217, 300).

It is undisputed that the Membership Party slate lost by a vote of approximately 7 to 1 (A.225-239).

The Secretary does not claim that there was any fraud involved and concedes that the election was conducted in a democratic fashion in full accordance with the By-Laws

of the Union (A.114-115). The District Court found that "the 1965 election, in accord with settled practice, was conducted with voting machines" (A.299) and that "so far as appears from this record, the voting was fairly and honestly conducted and the votes were accurately counted" (A.301).

Thereafter, certain members of the Membership Party protested the disqualification of some of its candidates to the International General President and to the General Executive Board of the International (A.11-13). Their appeals having been denied, they lodged a complaint with the Secretary of Labor (A.20) and, after investigation, the Secretary commenced this action.

IV

The Proceedings Below

The ground of the Secretary's action with which we are here principally concerned is that the election was in violation of § 401(e) of the Act (29 U.S.C. § 481(e)) because of the enforcement of the prior service requirement of the Union's By-Laws which allegedly imposed unreasonable qualifications on candidacy for office. As required by § 402(a) of the Act (29 U.S.C. § 482(a)), this ground had been the basis of proceedings within the Union invoked by the complaining members.

The Secretary's complaint as originally filed also set forth three other alleged violations as to which, however, no Union member had exhausted or even invoked any remedies within the Union or complained to the Secretary (A.201, 322).

On motion of the Union the allegations of violations as to which no Union member had invoked or exhausted internal union remedies were stricken from the complaint by opinion and order of Judge Edward C. McLean filed July 15, 1966 (A.18-22).

The various issues involved in the remaining violation alleged in the Secretary's complaint, namely, that the prior service requirement constituted an unreasonable qualification on candidacy for office, were thereafter tried before Judge Inzer B. Wyatt. In the course of the trial the Secretary made an offer of proof (A.78-81) regarding the stricken violations, but this offer was rejected by Judge Wyatt (A.165-166).

At the close of the trial, Judge Wyatt found (A.311-312) that:

> (1) The prior service requirement of the Union's By-Laws imposed unreasonable qualifications upon candidacy for office and the enforcement of the same in the election of May 19, 1965 constituted a violation of the Act; but that
>
> (2) "The aforesaid violation of the Act was not one which 'may have affected the outcome' of the 1965 election within the meaning of" § 402(c) of the Act.

Accordingly, Judge Wyatt denied the Secretary's prayer for a new election under his supervision. However, he permanently enjoined the Union "from enforcing in any future election . . . any by-law" imposing qualifications of the kind which he had found violated the Act (A.312).

The Secretary appealed to the Court of Appeals for the Second Circuit, and the Union filed a cross-appeal.

Upon the appeal, the Secretary attacked:

> (1) The refusal of the District Court to set aside the election on the ground that the violation found was not one which "may have affected" its outcome, and
>
> (2) The District Court's rejection of the Secre-

tary's offer of proof as to the additional violations alleged in the stricken paragraphs of the complaint.

The Union challenged:

(1) The District Court's holding that the prior service requirement violated Section 401(e) of the Act, and

(2) The issuance of an injunction against the enforcement of such requirements in future elections.

A majority of the Court of Appeals (per Judge Paul R. Hays) found that the prior service requirement was a reasonable qualification for office holding and did not violate Section 401(e) of the Act (A.321). Accordingly, the majority did not reach the question whether the enforcement of the requirement "may have affected the outcome" of the election (*ibid.*). Judge Dimock concurred on the ground that, although he judged the requirement unreasonable, its enforcement in the election did not affect the outcome thereof (A.323-326). The Court denied the Secretary's appeal from the rejection of his offer of proof of the violations alleged in the stricken paragraphs of the complaint (A.323); and the injunction issued by the District Court was set aside in view of the Court's holding that the requirement did not violate § 401(e) and also on the ground that the District Court was without power to issue such an injunction (A.323).

Petitions by the Secretary to the Court of Appeals for rehearing and for rehearing *in banc* were denied (A.329-330).

Summary of Argument

Foreword

The LMRDA must be construed in the light of the intent of Congress not to interfere in the internal affairs of trade unions beyond the minimum required to achieve the statutory objectives.

I

The Local 6 By-Law requirement that candidates for top union office must previously have served on the Executive Board, the Assembly or the Shop Delegates Council is a reasonable qualification on candidacy for office within the meaning of Section 401(e) of the Act.

(a) The requirement is designed to achieve a legitimate objective.

Local 6 is a complex organization with a large membership and substantial assets, which deals with over 200 employers throughout the New York Metropolitan Area. Its top officers, who are responsible for the conduct of its affairs, are selected by and from a heterogeneous membership of varied crafts and skills employed in shops scattered throughout the city. Section 401(e) of the Act, in providing that candidates for union office may be subject to "reasonable qualifications uniformly imposed", permits requirements designed to assure the competency of candidates for such positions. That such qualifications are not ordinarily imposed on candidates for governmental office does not support the contrary view. The problems and needs of unions differ from those of government, where there are other mechanisms, such as political parties, primary elections and nominating conventions, to screen aspirant from candidate.

(b) The required service on certain union-wide bodies provides broad experience in every facet of the Union's affairs on a union-wide basis and is reasonably calculated to assure competency. Service as a Department Delegate furnishes experience in local Union matters only.

Previous service requirements are found in the Constitution of an International Union of over 400,000 members and in the constitutions and by-laws of a number of local unions. But even if such requirements were not so widespread, they are appropriate in the special circumstances of Local 6.

The *bona fides* of the prior service requirement is not impugned by the fact that it is not applicable where officers are appointed. Where offices are filled by appointment, competency is reasonably assured by the judgment of an experienced Union body that a member is qualified for a particular position. The Constitutions of two International Unions with over 400,000 members each provide for the personal judgment of experienced persons in evaluating the competency of candidates for office. Unless the particular means selected by the Union to assure competency is patently unreasonable, the judgment of neither the Secretary nor the Court should be substituted for that of the Union.

(c) The prior service requirement does not frustrate the free and democratic Union elections which the Act was designed to assure. The purpose of Congress was to assure that union leaders be responsive to the wishes of the membership. The necessary and sufficient condition to assure this is to furnish the constituents with a genuine opportunity to change the administration.

Under the prior service qualification there was a pool of 1700 persons eligible to be candidates for paid office

in the 1965 election, approximately 55 persons for each of the 31 offices to be filled. This was more than an ample number of eligible candidates to enable the Union members to effect a change of administration.

The fact that a substantial number of those qualified to be candidates were at one time associated with the Adminstration Party does not support the inference that it would be difficult for the members to change the administration. Except for the few persons now holding office in the Union, all of the 1700 persons eligible as candidates are rank and file members who have no firm association with the present officers of the Union. Several qualified candidates of the opposition Membership Party in the 1965 election had previously been elected to the Assembly as candidates of the Administration Party. The real reason for the lack of opposition in the 1965 election was the absence of any significant or widespread dissatisfaction with the way the Union was being run.

The prior service requirement does not deprive individual members of a reasonable opportunity to stand for office. Any member in continuous good standing for a year is eligible to run for the Assembly, and if he is elected and serves for a year, he becomes qualified to be a candidate for paid office.

The Secretary's suggestion that the 1965 election was conducted in a "climate in which opposition was discouraged" is without evidence to support it. The Secretary's extensive investigation into the conduct of the election did not produce a single witness to testify to any such "climate"; and there is nothing in the testimony of the two Membership Party members who were witnesses for the Government that even suggests the existence of such a "climate". The evidence is all to the contrary.

11

The previous service requirement, even if found to be unreasonable, did not affect the outcome of the election.

The Act provides that an election may be set aside only if the Court finds "upon a preponderance of the evidence after a trial upon the merits . . . that the violation . . . may have affected the outcome of [the] election . . ."

The 1965 election in Local 6 was hotly contested. The opposition Membership Party ran candidates for the union-wide positions of President and General Organizer; and its candidates for Secretary-Treasurer and Recording Secretary who were disqualified ran for the union-wide position of Delegate to the International Convention. These candidates and a number of others ran together on one slate and on one platform. All of the Membership Party candidates, disqualified as well as qualified, participated in the Party's campaign and urged the members of the Union to vote for its slate of candidates who ran regardless of the disqualification of others.

The Membership Party's candidates lost by margins of approximately 7 to 1.

The District Court found that the prior service requirement could not have affected the outcome of the election.

The Secretary takes the extreme position that an election found to have been in violation of Section 401 must be set aside if there was any *possibility*, no matter how slight, that the alleged violation may have affected the outcome, or, conversely, unless it is shown to have been *impossible* that the alleged violation affected the outcome. Thus the Secretary asserts that "the Court went beyond its proper role in attempting to weigh probabilities." The

effect of the Secretary's position is (a) to nullify the language of the Act providing that the question whether an alleged violation has affected the outcome of an election must be determined "upon a preponderance of the evidence", and (b) to foreclose the courts from exercising the normal judicial function of weighing evidence and to compel them to make a finding on the basis of the barest possibility, regardless of the weight of evidence to the contrary.

In the case at bar, there was overwhelming evidence on the basis of which the Court below, after giving consideration to the "possible effect [of the By-Law] in discouraging others from coming forward as opposing candidates", found that the existence and enforcement of the By-Law could not have affected the outcome of the election. This finding, made after four days of trial, at which both members of the Union's administration and members of the opposition party testified, should not be set aside unless "clearly erroneous."

III

Certain alleged violations set forth in the Secretary's original complaint, which were stricken by the District Court, were properly excluded from the case.

No Union member made any complaint to the Union or exhausted remedies within the Union regarding the stricken violations. The only complaint made to the Union was about the prior service requirement. This did not give the Union any notice of the stricken violations, and the Secretary does not claim that it did. The stricken violations were first called to the Union's attention after the Secretary had made his investigation.

The legislative history of the Act shows that the intent of Congress, in requiring the exhaustion of intra-union

remedies, was to preserve union independence and self-government by affording unions an opportunity to correct improper elections upon members' complaints to the Union and prior to intervention by the Secretary. In *Wirtz* v. *Local Union 125*, 389 U.S. 477 (1968), the Court decided no more than that the Secretary could maintain an action under Section 402 predicated upon an alleged violation of which no specific complaint had been made to the union, where the union had received "fair notice" of such violation from another complaint lodged with it so that it had a fair opportunity to consider and redress such violation before governmental intervention.

As it cannot be claimed here that the Union received such notice or had such opportunity with respect to the alleged violations which were stricken, the Secretary is asking this Court to rule that he may assert in his complaint any matter called to the Union's attention prior to the institution of the Secretary's court action.

The Secretary's position negates the language of Section 402 requiring the exhaustion of internal union remedies. If the independence and integrity of unions can be sufficiently protected by calling alleged violations to the attention of the Union *after* the Secretary has made his investigation and before he has started his action in court, Congress might as well have said nothing about the exhaustion of internal union remedies and provided that proceedings under Section 402 may be instituted by a member's complaint to the Secretary or on the Secretary's own initiative.

Afterword

The prior service requirement which was in force at the time of the 1965 election has been amended to add two additional categories of eligibles, namely, persons who have been Department Delegates and persons who have been members of the Union for five years. Under the

amended provision, there is a pool of more than 16,000 persons qualified as candidates for paid office, providing more than 500 eligibles for each office.

The Union's regular general election to be held on May 16, 1968 will be conducted under this new By-Law provision. That election will render academic the existing controversy before this Court which concerns the validity of the 1965 election under the old By-Law, and the case will be mooted. *Wirtz* v. *Local 153, Glass Bottle Blowers Association,* 389 U.S. 463 (1968), is distinguishable because there the intervening election was held under the same by-law as the original election, so that a holding of mootness would have left the violation unvindicated. *Wirtz* v. *Local 125,* 389 U.S. 477 (1968), is distinguishable because there the gravamen of the complaint was the *conduct* of the election, so that the holding of an unsupervised election gave no assurance that the unlawfulness infecting the challenged election had been eliminated.

In the case at bar there is no charge of misconduct, but only a charge that the 1965 election was conducted under an unlawful by-law. As the new election will be conducted under a by-law appropriately amended, no purpose would be served by ordering a supervised election.

ARGUMENT

Foreword

The LMRDA was enacted as regulatory legislation to eliminate or prevent what Congress found to be improper practices on the part of labor organizations, their officers and others (LMRDA § 2, 29 U.S.C. § 401). However, the Act's legislative history shows that it was not intended to authorize governmental interference in the internal affairs of trade unions beyond the minimum required to achieve the statutory objectives.

"In acting on this bill,* the committee followed three principles:

"1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards, great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.

"2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The Committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.

"3. Remedies for the abuses should be direct . . ."

S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. p. 7, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959,** p. 403.

This Court has found that the special function of Title IV of the Act, in which the statutory provisions here in question are contained, is to insure free and democratic elections. It pointed out, however, that

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* S. 1555, 86th Cong., 1st Sess. This bill, after Conference amendments, was enacted into law as the LMRDA. The election title of the Bill (Title III) was enacted as Title IV of the Act virtually as drafted by the Senate.

** Hereinafter referred to as "Leg. Hist."

> "The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections *without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.*" (Italics supplied).
>
> *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 470-471 (1968).

This manifest legislative purpose is directly relevant to each of the issues here presented.

POINT I

The requirement contained in the Union's By-Laws that candidates for important and responsible office in the Union must previously have held one of several positions in the Union is a reasonable qualification within the meaning of the Act.

The Act specifically provides that eligibility to be a candidate for union office may be "subject . . . to reasonable qualifications uniformly imposed." (LMRDA § 401(e), 29 U.S.C. § 481(e)).

The requirement here in question is "reasonable" because:

(A) It is designed to achieve a legitimate objective;

(B) It is reasonably adapted to achieve that objective;* and

(C) It does not defeat the purposes of the Act.

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* The word "reasonable" has been held to mean "fit and appropriate to the end in view" (*State* v. *Vandersluis*, 43 N.W. 789 (Cir.Ct.Minn. 1889)) and "rationally relevant to a legitimate regulatory purpose". (*Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 244 F.Supp. 745, 748 (W.D. Pa. 1965), judgment vacated and remanded 372 F.2d 86 (3d Cir. 1966), reversed and remanded 389 U.S. 463 (1968)).

A.

The requirement is designed to achieve a legitimate objective.

The objective of the prior service requirement is, of course, to provide some degree of assurance that candidates for General Office, Vice-President and Business Agent of the Union have such prior experience and knowledge of Union affairs that they are competent.

The Union is an organization of over 26,000 members who work for over 200 employers scattered throughout the New York Metropolitan Area (A.167, 320). It has collective bargaining agreements with practically every hotel, motel and club in New York City (A.167), and as collective bargaining agent under such agreements it has serious responsibilities not only towards its members but also towards the multi-billion dollar industry in which they work and the public which they serve. The Union has over $2,300,000 of net assets and participates in the management of pension, welfare and medical funds having assets aggregating more than $30,000,000 (A.320).

The General Officers, the Vice-Presidents and the Business Agents are responsible for the conduct of the affairs of the Union and are primarily accountable for its proper functioning, the conservation of its assets, the maintenance of proper wage standards and working conditions for its members, and the preservation of labor peace in the New York Hotel Industry (A.171). These officers must be selected by and from a large and heterogeneous membership employed throughout the New York Metropolitan Area, whose skills run the gamut from chef to potwasher, from chief housekeeper to chambermaid, and who, because of the Union's size, are not likely to have any personal acquaintance with candidates for office (A.92, 180).

On the face of the matter it is not unreasonable to impose a qualification designed to assure that candidates for these positions have at least minimum ability to do their jobs.

The statutory language of § 401(e) of the Act expressly providing that nominees for union office may be subject to "reasonable qualifications uniformly imposed" must obviously have been intended to allow, among others, qualifications designed to assure the competency of candidates. Indeed, the Government concedes this to be a legitimate objective of such qualifications. (Govt's brief, p. 15). This is not surprising because the objective of assuring competency to hold office is the one objective which has as its end the excellence of the electoral process. If union elections may be restricted by any qualifications on candidates whatever (and to say that they may not be would nullify clear statutory language), surely qualifications designed to improve the electoral process should be viewed more indulgently than qualifications which are designed to achieve other union ends unrelated to elections.

The District Court held the prior service requirement invalid on the broad ground, among others, that a qualification for office holding designed to assure "a certain minimum of experience in union affairs" is contrary to "the philosophy of a free democratic society" (A.304-305). Along the same line the Secretary argues (Brief, p. 17) that "the idea [of democracy in this country] has . . . been to place trust in the common sense and judgment of an informed electorate" and that "Congress plainly intended that the same factor govern in the conduct of union elections."

These are facile generalizations utterly without support in the language of the statute or its legislative history,*

* The sentence from the Senate Report quoted by the Secretary (Brief, p. 17) in support of his statement is taken out of context from a paragraph of the Report quoted in full at Page 22 of this brief. The thrust of that paragraph is not that the power of union members to regulate union affairs should be unrestricted by democratically adopted union by-laws, but that such power should not be interfered with by the Government.

which overlook the obvious fact that unions differ from Government in their history, structure, purpose and a host of other ways. But even if the analogy of unions to Government were sound, it would not support any sweeping condemnation of qualifications for office holding which seek to assure competence of officials.

Only the most naive are unaware that through our system of political parties, primaries, nominating conventions, etc., the candidates who finally appear on the ballot are subjected to an elaborate sifting process * which, in theory, and to some extent in practice, results in the selection of candidates reasonably competent to hold office. Surely where, as in Local 6, any member in good standing can place in nomination the name of any other member (A.298), it is not contrary to our basic political philosophy to impose qualifications on nominees designed to require a certain minimum of experience in union affairs.

As the majority of the Court below held in the case at bar:

> "... we hold that it is not self-evident that basic minimum principles of union democracy require that every union entrust the administration of its affairs to untrained and inexperienced rank and file members. Local 6 has over 26,000 members. .... It does not seem to us to be surprising that the union should hesitate to permit a cook or a waiter or a dishwasher without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union." (A.320).

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* See, for example, Merriam and Foote, "The American Party System", The Macmillan Company, 1950, esp. p. 361.

B.

The prior service requirement is a reasonable and appropriate means of trying to assure that top union officers possess a minimum amount of experience and competence.

The Secretary concedes that not every "prior office-holding requirement would be unreasonable" (Secretary's Brief, p. 15).

The requirement here in question is that to be eligible for nomination as a paid officer of the Union a candidate must have served on the Executive Board, the Assembly or the old Shop Delegates Council.* Such service would provide a union member with substantial opportunity for obtaining experience and understanding of Union affairs (A.82-88).

Assembly Members (and likewise, in the past, members of the Shop Delegates Council) debate and vote upon the financial expenditures of the Union, collective bargaining negotiations, craft problems and other vital Union matters. They are automatically members of their respective District Councils and as such participate in the work of the District Councils, in particular the handling of grievances on the shop level. They are also members of the various union-wide committees such as the Department Committees, the Wage Policy Committee, the Grievance Committee, the Finance Committee, and the By-Laws Committee, and participate in the work of those Committees in the formulation and execution of fundamental union policies and programs (*ibid.*).

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* Candidates for paid union office are also required to have been members of the Union in continuous good standing for two years prior to nomination (A.207); but this qualification has not been challenged.

The Secretary's assertion that "less than a third" of the Assembly members served on such committees (see Secretary's Brief, p. 19) is incorrect. The record reference cited by the Secretary simply establishes that there were 110 or 120 Assembly members on the Wage Policy Committee. But this is only one of the many committees on which Assembly members serve. Accordingly, the Secretary's claim that only a third of the Assembly members serve on union-wide committees is without support in the record (see to the contrary A.82-87).

Thus the majority of the Court of Appeals found in the case at bar:

> "Membership in the union's Assembly, which under the union's by-law is the principal basis for eligibility for positions of greater responsibility, provides an opportunity for meeting with the officers and with other more experienced members for discussion and consideration of contract negotiations, enforcement of contract clauses, union finances and many other aspects of union administration. Members of the Assembly are also members of district councils and they participate there in the work of the various committees which deal with all aspects of union problems.
>
> "We do not believe that it is unreasonable for a union to condition candidacy for offices of greater responsibility upon a year of the kind of experience and training that a union member will acquire in a position such as that of membership in Local 6's Assembly." (A.320)

The Secretary attacks the prior service requirement by arguing (1) that similar qualifications are seldom found in other unions; (2) that it is arbitrary not to include service as a Department Delegate * as an alternative basis

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* Whom the Secretary calls "Shop stewards" (Secretary's Brief, p. 20).

for qualification, and (3) that the *bona fides* of the previous service requirement is impugned by the fact that it does not apply to positions filled by appointment.

(1)

The evidence introduced by the Secretary on his first argument lends support to the Union's position. It shows that:

1. The International Ladies Garment Workers Union (with over 440,000 members) requires either prior experience in a union position or the completion of a training course as a requirement for candidacy for local union office (Exhibit 72, A.266);

2. Thirty-two of the one hundred and twenty-five largest local unions affiliated with the Hotel and Restaurant International (the parent International of Local 6), having one-third of the entire membership of those local unions, have a prior service requirement for candidacy for office (Exhibit 69, A.250);

3. Seven local unions (including Local 6) of the sixty-six local unions with receipts of more than $1,000,000 in 1964 have a prior service requirement for candidacy for office (Exhibit 71, A.260).

The foregoing facts are established by evidence adduced by the Secretary covering only the constitutions of certain national and international unions and the constitutions and by-laws of fewer than 200 local unions. A study of the constitutions and by-laws of the some 40,000 other local unions in the United States might well reveal that prior service qualifications for candidacy for local union office are even more prevalent than the government's evidence shows.

Whether qualifications for union office are reasonable depends, however, not on the ubiquity with which they are employed but upon the particular circumstances of the union, such as the size of its membership, the number,

size and geographical distribution of the employers, the nature of the industry, etc. The fact that the constitutions of most international and national unions * do not require previous service as a qualification for local union office has no relevancy to the reasonableness of the prior service requirement of Local 6 absent a showing that the local unions affiliated with such national and international unions are similarly circumstanced. The only union that has come to our attention similar in size and structure to Local 6 is Local 32B of the Building Service Employees International Union, and the by-laws of that union provide for prior service as one of two alternative bases for qualification for union office (Tr. 587).

(2)

The Secretary contends that it is arbitrary to predicate eligibility for office holding on Assembly membership and to deny it to persons who have been Department Delegates only (Secretary's Brief, p. 20).

The Secretary is wrong on the facts. Department Delegates are involved with the narrow and local matters that arise in the shops and District Councils (A.55-56). Assembly members, on the other hand, not only serve on the District Councils where they gain the same experience as the Department Delegates but also serve on the Assembly itself and on the union-wide committees all of which deal with the most important activities of the Union on a union-wide basis (A.82-87).

(3)

The Secretary argues that the prior service qualification is impugned by the fact that it is not required when positions are filled by appointment. Attention has been

* The reference in the Secretary's Brief (at p. 18) to the 23 unions having membership between 20,000 and 40,000 is misleading in failing to mention explicitly that these are national unions and not local unions.

directed to the appointment of temporary business agents (A.293) and of Delegates to the New York Hotel and Motel Trades Council who, under the By-Laws (A.202), are members of the Administrative Board (Secretary's brief, p. 19).

The fact that prior service is not required where persons are appointed to office, does not vitiate or impugn the qualification. It simply constitutes the use of an alternative method to achieve the same end, *i.e.*, the judgment of the Assembly, an experienced body representing the members, that a particular member is qualified for a particular position. Obviously there may be members of the Union who cannot satisfy the prior service requirement but who, by their activities in hotels and clubs, their attendance at courses and otherwise, demonstrate competency and leadership qualities. The use of the personal judgment of experienced persons in evaluating competency for office is authorized by the International Constitutions of both the International Ladies Garment Workers Union and the International Hod Carriers and Common Laborers Union (each of which has a membership of well over 400,000) which provide for the determination by a committee of whether a candidate for office has the necessary ability.*

Although the position of Delegate to the New York Hotel and Motel Trades Council is not an "office" within the meaning of the provisions of the Act requiring that union officers be elected by the membership, the truth is (though not referred to in the record),** that such Delegates have always been either Assembly members or officers of the Union eligible under the previous service requirement. The record shows that appointed business agents

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* "Union Constitutions and the Election of Local Union Officers —an Analysis", published by United States Department of Labor, Labor-Management Services Administration (1965) at pp. 63-64.

** No question regarding the appointment of Delegates to the Hotel and Motel Trades Council was raised until the case was in this Court.

who did not fulfill the prior service requirement were graduates of a special training course for union leadership which was organized by the Union and made available to the entire membership (A.88-90). This course, which was conducted under the direction of a professor of the Cornell University School of Labor Relations, furnished six months of instruction both in classrooms and in the field (A.93-94).

There are various ways of seeking competent union officials. Each has certain advantages; each has certain drawbacks. The desirability of any set of qualifications will depend upon the particular facts and circumstances of the union in question, its history, membership, organization, etc.

If the qualifications are reasonably adapted to achieve the desired objective, they should not be invalidated because the Secretary or even the Court believes that other qualifications would have been better. Such an approach would contravene the intent of Congress not to depart "needlessly from its long standing policy against unnecessary governmental intrusion into internal union affairs."*

> "It is not the function of the Secretary to determine what prescribed qualifications for office will best serve the purposes of union democracy nor to dictate what policy unions should follow in limiting candidacy for union office. The union's own rules as to eligibility must prevail unless they impose unreasonable qualifications. We are persuaded that in the present case the Secretary has trespassed upon an area of union governance which is left by the statute to the union's decision" (A.321).

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* *Wirtz* v. *Local 153, Glass Bottle Blowers Association, supra,* at 471.

C.

The prior service requirement does not frustrate the free and democratic union elections which the Act was designed to assure.

The statutory objective of free and democratic union elections has two aspects: (a) The objective of providing individual union members with a reasonable opportunity to stand for office; and (b) the objective of assuring the membership as a whole a reasonable opportunity to nominate and vote for candidates of their choice.

In dealing with the question whether the prior service requirement unreasonably restricts these objectives, we shall take them up in reverse order.

(1) The qualifications do not unreasonably restrict the members' opportunity to nominate and vote for candidates of their choice.

The underlying purpose of Congress in respect to union elections is set forth in the Senate Report on S.1555:

> "It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours and conditions of employment. . . . The Government which gives unions this power has an obligation to insure that the officials who wield it are *responsive* to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections. *The responsiveness of union officers to the will of the members* depends upon the frequency of elections and an honest count of the ballots . . ." (Italics supplied)
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> S. Rep. No. 187, p. 20, 1 Leg. Hist. 416; See also H. Rep. No. 741, p. 16, 1 Leg. Hist. 773-774.

> "Union members have a vital interest . . . in the policies and conduct of union affairs. To the extent that union procedures are democratic they permit the individual to share in the formulation of union policy. This is not to say that in order to have democratically *responsive* unions, it is necessary to have each union member make decisions on detail as in a New England town meeting. What is required is *the opportunity to influence policy and leadership* by free and periodic elections." (Italics supplied.)
>
> S. Rep. cited above, at pp. 6-7, 1 Leg. Hist. 402-405.

The objective was to compel *responsiveness* on the part of union officials to the desires of the members and thereby *to allow the members effectively to influence union policy.* Once the size of the body politic is too large for town meetings and the people can act only through elected officials, this is the only meaningful objective in union government as in any representative democracy. There is one condition both necessary and sufficient for achieving it: union elections must afford the members *a genuine opportunity to change the administration, "to throw the rascals out".* Where such an opportunity is denied, there can be no democracy in a union. Where such an opportunity is given, the essence of representative democracy is preserved.

The evidence shows that there were at least 1700 members of the Union qualified to run for paid office in the 1965 election. As there were 31 paid offices to be filled, there were approximately 55 persons qualified as candidates for each office.* Common sense suggests that this is more than an ample pool of candidates to provide the members with a genuine opportunity to change the administration.

The Secretary contends (Brief p. 23) that because election to the Assembly is required to qualify for paid office, a change of leadership can come about in only one of two ways: (a) by a "palace revolt" or (b) by a two step

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* The Secretary concedes 60.

process of first electing candidates to the Assembly and then running those candidates for union office at the next election three years later.

This view can be sustained only on the premises that all those qualified to run for union office have become so by election on an Administration Party slate and that persons who have run as Administration Party candidates will remain loyal to that party regardless of the passage of time and changed circumstances in the Union. There is no warrant for these assumptions.

Not all persons qualified became so by election on an Administration Party slate. There are approximately 1200 former members of the old Shop Delegates Council who are now active members of the Union and qualified for paid office, none of whom was elected on any ticket (A.45). All of them are rank and file members who have no stake in the Administration Party and no association with the present leaders of the Union. In fact, one of the Membership Party candidates who ran for paid union office in the 1965 election was qualified by virtue of his membership on the old Shop Delegates Council.

The 500 odd persons eligible for paid office by virtue of Assembly membership are also rank and file members of the Union. Although elected to the Assembly on an Administration Party slate, they have no permanent association with or obligation to the present Union leaders. As active Union members they would be the first to join any meaningful opposition party if the Union were mismanaged. Indeed, three of the candidates of the Membership Party who ran for paid office in the 1965 election, including Charles Salavarria, a witness for the Government, were qualified by virtue of former membership in the Assembly to which they had been elected as candidates of the Administration Party. It is simply unrealistic to regard "parties" and "administrations" in a union as commanding the permanent loyalty of the persons at various times associated with them.

The speculations and generalizations at pp. 21-22 of the Secretary's brief advanced to prove the restrictive effect of the prior service qualification simply beg the question and assume the Secretary's position to be correct. They are no substitute for evidence which is notably lacking. Although the Secretary conducted a thorough and lengthy investigation into the affairs of Local 6 and interviewed scores of members, he did not produce one jot of testimony or evidence of any kind that even suggests that any of the 1700 odd members eligible to run for paid office wished to do so but was prevented or discouraged from doing so by any of the considerations advanced by him.

The only evidence is all to the contrary. Although in the 1965 election there was so little dissatisfaction with the incumbent officers that the opposition candidates of the Membership Party were defeated by a 7 to 1 margin, that party was nevertheless able to enlist 4 candidates from the pool of qualified persons to run for paid office on its slate. Its failure to enlist more candidates was simply due, as the District Court found (A.308), to the absence of any substantial rank and file dissatisfaction. The inference is overwhelming that if there had been any significant dissatisfaction among the members with the leadership of the Union, one or more full slates of candidates qualified for paid union office could and would have been placed in opposition to the Administration Party.

The percentage of the total membership of the Union eligible to run for paid office in the 1965 election is not significant. The existence of a genuine opportunity for the members to change leaders depends not on percentages but upon the presence of a pool of available candidates which is numerically large enough to furnish a reasonable number of alternative candidates for each office. A percentage of the membership adequate to furnish such a real choice in a union of 26,000 members with 31 offices to fill, obviously does not have to be as high as the percentage required to furnish a real choice in a union of 500 members even if there are only 10 offices to fill.

(2) The qualifications do not unreasonably restrict the opportunity of an individual member to stand for office.

On this aspect of the case the question is whether the qualifications are so harsh in their impact on members who wish to stand for office that they are arbitrary.

We submit that they are not.

Any member in continuous good standing for a year is eligible to run for the Assembly. If he is elected and serves for a year, he becomes qualified to be a candidate for paid office. On its face, this is not an arbitrary requirement. A rank and file member of Local 6 can win an Assembly seat without Administration Party support even in the face of general membership contentment. There are many situations where a candidate could be elected to the Assembly by obtaining only the votes of the other union members employed in his hotel (A.118-121). A fortiori, should there be a ground swell of discontent among the members, dissidents will have no difficulty whatever in gaining election to the Assembly.

To be sure, members who become eligible for paid office by virtue of their first election to the Assembly cannot run for such office until the next election. This, the Secretary complains (at p. 23 of his Brief), may cause a time lapse of 4 or more years. But a time lapse is inevitable where there is a previous service requirement, so to say that there may be no such time lapse would *ipso facto* outlaw all such requirements. In this case, the time lapse is caused by the By-Law provisions requiring a year's membership to run for the Assembly and providing for elections every 3 years—both of which are lawful under the Act. Requirements to run for important union offices which are otherwise reasonable do not become arbitrary because aspirants for such offices are subject to such delay.

• • •

The Secretary has suggested that an inference may be drawn that the officers of the Union have used the prior service requirements "to suppress and avoid competition at the polls" (Brief, p. 16); and he has gone so far as to assert (Brief, p. 28) that the requirement evidences "a climate in which opposition was discouraged". There isn't a word in the record to justify these inferences. There is much to contradict them.

Nothing was adduced to show that any of the leaders of the Union by means of the prior service requirement, or by means of the power to make appointments where that requirement was not satisfied, or by any other means, have ever attempted to perpetuate themselves in office or to suppress or avoid competition at the polls. Two members of the opposition Membership Party testified for the government; but there is not a word in their testimony to suggest any oppression by the incumbent union officials (A.121-149). The testimony of James Marley, President of the Union, plainly demonstrates the contrary (A.49-91, 166-199).

The suggestion that a climate "in which opposition was discouraged" can be inferred from the success of the Administration Party in the 1965 and prior elections or from the "absence of a contested election for most offices" is unwarranted. It is also contradicted by the findings of the District Court that ". . . the primary reason for the heavy vote in favor of the administration was the lack of any real grievance or issue against the union management" (A.308) and that "any substantial rank and file dissatisfaction would have produced many more opposing candidates for the Assembly than the 5 who actually ran" (*ibid.*). The reason for the success of the Administration Party is that the members of Local 6 are substantially contented in the enjoyment of the highest standards of wages, hours and working conditions of hotel employees

anywhere in the United States (A.167-177). In addition, Local 6 has provided its members with the following outstanding benefits and services:

1. Local 6 was the first hotel union in the United States to gain health, welfare and pension benefits for its members (A.169).

2. The labor relations of Local 6 have been so successfully handled that, during the 27 years since union management contracts were first established, each contract has been renewed without the necessity of strikes and all differences between hotel workers and employers have been resolved either by direct negotiations or by the submission of the dispute to an impartial chairman (A.171).

3. Local 6 has its own social service department to assist its members. It also participates in the sponsorship of a city-wide network of Neighborhood Service Councils where a member of the Union and his family may go for help in such areas as landlord and tenant problems, garnishment, income tax, consumer frauds and installment sales (A.173).

4. Local 6 has successfully sponsored various legislation, including a law to provide adequate social security coverage for tipping employees and a law to alleviate certain harsh features of the garnishment statute (A.174-175).

5. Since 1954, Local 6 has maintained a college scholarship plan and an educational advisory service for the children of its members (A.175-176).

The history and background of Local 6 contradict any claim or suggestion that the officers of the Union have tried to suppress opposition. On the contrary, they show that the Union leadership has always protected and preserved basic democratic rights and sought to encourage maximum membership participation in Union affairs.

For over twenty-five years, long before the enactment of the LMRDA, Local 6 took steps to secure and maintain free and democratic elections through open nominations, and the use of poll observers, secret ballots and voting machines.

Because the Union's members work in different crafts and in hotels which differ widely in size and quality (A.51-52), the members of one hotel and one occupation may, from time to time, have interests which diverge widely or even conflict with those of employees in other hotels and other occupations. It was important to reconcile these interests and to prevent the domination of the smaller by the larger (A.292). Accordingly, the Union from its very early days evolved a complex system of proportional representation established in its by-laws, designed to meet its needs and to insure that every group and every hotel would be properly represented in the government of the Union (A.180). At the same time, in order to encourage the rank and file members to become involved in the activities and affairs of the Union, the Union evolved its structure of Department, Department Boards and District Councils (*ibid*). These bodies also provide the membership with opportunity to raise issues peculiar to their craft or hotel, and to resolve these issues with their leadership (A.55-56, 85).

It is, we believe, in light of this history and background that the By-Law in issue must be judged.

> "Thus, the basic interpretive problem here is one of balancing between competing goods. It is desirable that aspirants for union office meet relevant minimum qualifications. It is also desirable that members who desire to become union officers should have the opportunity to stand for office. The problem is not unlike that faced by the political scientist who favors democratic elections of all public officeholders yet believes that only persons with certain education and experience should hold positions in the judiciary. In approaching the dilemma posed by the statute, the administrator is faced with the temptation to substitute his judgment for that of the union—a tempta-

tion to be avoided to the extent human frailty permits. The issue posed by the provision under discussion is *not* a question of the *desirability* of a given qualification which has been adopted by a union. Rather, the issue is whether under all of the circumstances (the history of the union, the duties of the office, the industry involved, the collective bargaining relationship, the craft or job classification represented, etc.) there is a reasonable justification for the use of the qualifying standard as a screen between aspirant and candidate. Based on the first four years of administrative experience under the act it is probably a safe conclusion that restrictions on candidate eligibility which are not violative of some other provision of the act may not be challenged successfully under the instant provision unless they are demonstrably arbitrary or capricious." *

POINT II

The existence and enforcement of the previous service requirement could not have affected the outcome of the election.

Section 402 of the Act (29 U.S.C. § 482) provides that in an action by the Secretary to set aside an election alleged to be in violation of the Act, the election shall be declared void and a supervised election ordered—

> "(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> * * *
>
> "(2) that the violation of Section 401 may have affected the outcome of [the] election . . ."

The application of this statutory requirement to the case at bar must be considered in the light of the following uncontradicted facts:

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* Howard Jenkins, Jr., (member of the National Labor Relations Board) "Trade Union Elections" in Symposium "Regulating Union Government" edited by Estey, Taft & Wagner, at pp. 164-165.

1. The opposition Membership Party ran candidates for the General Offices of President and General Organizer; and its proposed candidates for the General Offices of Secretary-Treasurer and Recording Secretary, who were found to be disqualified for such office, both ran for the position of Delegate to the International Convention (A. 187-188). Thus, all of the Membership Party's nominees for General Office were on the ballot and all ran for union-wide positions voted on by the full membership (A.225-239). The Party also ran 5 other candidates for Delegate to the International Convention, 2 candidates for Business Agent and a number of candidates for the Assembly (*ibid.*).

2. The various Membership Party nominees who were eligible ran together as a single slate, with a common platform, their names appearing together on one row of the ballot (A.212-217, 300); and the Party's nominees who were ineligible indicated that if they had run they would have done so on the same slate, with the same platform and on the same line of the ballot (*ibid.*).

3. The Membership Party hired a campaign headquarters (A.148) and conducted a campaign in which all of the Party's candidates, disqualified as well as qualified, participated (A.148-149). Among other things, the Party distributed leaflets, visited hotels and conducted meetings in an all out effort to solicit votes (*ibid.*). One of the leaflets stated:

> "We urge you, though some of our names do not appear on the ballot, to vote Row B all the way because we are running all the way (Ex. C, A.280).

4. The wages, hours and other conditions of employment of the members of Local 6 are the highest of any hotel workers in the country (A.173).

As the Secretary concedes, the Membership Party candidates lost by margins of approximately 7 to 1.

These facts plainly establish that, even if the disqualified candidates had been permitted to run for the offices which they sought, the candidates actually elected would have been elected just the same and the disqualified candidates, as well as the candidates actually defeated, would have been defeated just the same. In other words, the existence and enforcement of the previous service requirement could not have affected the outcome of the election. The District Court so held, and the concurring Judge of the Court of Appeals agreed.*

Opposing this conclusion, the Secretary cites the fact that the language of the Kennedy-Ervin Bill (S. 505) authorizing the voiding of an election upon a finding that the violation "affected the outcome" was amended to authorize the voiding of an election upon a finding that the violation "*may have* affected the outcome". From this, and from an ambiguous statement on the Senate floor by Senator Goldwater, who was one of the minority members of the Senate Committee on Labor and Public Welfare in its report on S. 1555 (S. Rep. No. 187), the Secretary would have this Court infer a legislative intent to set aside all elections found to have been in violation of the Act except where the fact that the outcome was not affected by the violation is demonstrated with absolute mathematical certainty, *i.e.*, is shown to have been *impossible*. Conversely, the Secretary's position is that where there is a possibility, no matter how remote, that the alleged illegality affected the outcome of the election, the election must be set aside. He urges that where candidates have been disqualified, it can never be shown that it was impossible that the outcome of the election was affected. He concludes, therefore, that in the case at bar the fact of disqualification, without more and despite overwhelming evidence to the contrary, was

* As the majority of the Court of Appeals found the requirement to be reasonable, it never reached the question whether its application affected the outcome of the election.

sufficient to establish that the alleged violation "may have affected the outcome" of the election within the meaning of the Act.

The Secretary's interpretation nullifies statutory language.

Section 402 provides that the requisite finding that the violation "may have affected the outcome" of the election is to be made by the Court "upon a preponderance of the evidence". Under the Secretary's construction, only a showing of impossibility can avoid the setting aside of the election. But possibility and impossibility are absolutes to which the concept of "a preponderance of the evidence" can have no meaningful application. A possibility can be established and an impossibility disproved by a scintilla of evidence no matter how much or how weighty the evidence to the contrary. A possibility can be disproved and an impossibility established (which is what the Secretary asserts is the defendant's burden in seeking to show that an alleged violation did not affect the outcome of an election) only on the basis of *all* the evidence, without a grain of evidence to the contrary. Either way, there is no room for the Court to weigh the evidence. The Secretary concedes this when he states in his brief (at page 29), "in our view, the Court went beyond its proper role in attempting to weigh probabilities." Accordingly, under the Secretary's construction, the statutory mandate that the Court's finding must be "upon a preponderance of the evidence" is effectively nullified.

The Secretary's position conflicts with the legislative history of the Act.

As this Court has pointed out, Congress, in enacting the LMRDA did not intend to depart "needlessly from its long-standing policy against unnecessary intrusion into internal union affairs" (*Wirtz* v. *Local 153, supra*). If

such intrusion is to be avoided, an election should not be set aside in a 402 action unless it appears with some degree of likelihood—more than a bare possibility—that if there had been no violation, the election would have gone the other way. That this was the intent of Congress is shown by the following statements in the majority report of the Senate Committee on Labor and Public Welfare on S. 1555, made after the change in the language of the bill relied on by the Secretary:

> "Since an election is not to be set aside for technical violations but only if there is reason to believe that the violation has probably affected the outcome of the election, the Secretary would not file a complaint unless there were also probable cause to believe that this condition was satisfied."
>
> S. Rep. No. 187 at p. 21, 1 Leg. Hist. 417.

> "If the court, upon a preponderance of this evidence, finds that . . . a violation of section [401] did or reasonably could have been expected to affect the result of an election, the court is to declare the election void and direct the holding of a new election under supervision of the Secretary of Labor."
>
> S. Rep. No. 187 at p. 48, 1 Leg. Hist. 444.

Congress intended to require substantially more than a showing of a bare possibility that the outcome was affected.

The insertion of the words "*may have*" no doubt reduced the quantum of proof required of the Secretary on the question whether the violation affected the outcome. It may be assumed for the sake of argument that in a disqualification case the Secretary's burden under the Act is *prima facie* satisfied by proof of the disqualification alone and that the burden of going forward then shifts to the defendant. But this is a far cry from the Secretary's posi-

tion that once there has been a bare showing of disqualification alone, the courts are foreclosed from exercising their normal function of determining facts by weighing evidence and evaluating probabilities and are compelled to find that the outcome may have been affected on the basis of the barest possibility regardless of evidence to the contrary.

In support of his position the Secretary cites *Wirtz* v. *Local Unions 410 etc.*, 366 F. 2d 438 (2d Cir. 1966) and *Wirtz* v. *Local Unions 406, etc. International Union of Operating Engineers*, 254 F. Supp. 962 (E.D. La. 1966).

In *Local Union No. 406*, the District Court interpreted the word "may" to indicate "the necessity only for the showing of a reasonable possibility that the violation would affect the outcome". As the concept of possibility is an absolute which has no degrees, it is meaningless to speak of a "reasonable" possibility. We conclude, therefore, that the Court in *Local Union No. 406* construed the statute to mean that the requirement that a violation may have affected the outcome of the election is satisfied by the showing of any possibility. We submit that this construction is erroneous for the reasons stated above.*

The language quoted in the Secretary's brief from the opinion of the Court of Appeals in *Local Unions 410, etc.*, seems on its face to lend some credence to the Secretary's position that where there has been an "exclusion of willing candidates from the ballots" this alone compels the conclusion that the violation "may have affected the outcome", regardless of all evidence to the contrary. But a reading of the whole opinion shows otherwise.

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* As the Court in *Local Unions No. 406* refused to set aside the election because the matters alleged by the Secretary had not been the subject of any internal protest in the union the Court's pronouncement on the matter here at issue was dictum.

The Court of Appeals in *Local Unions 410, etc.*, did not construe the Act to mean that the showing of a bare possibility that the outcome may have been affected is sufficient to satisfy the requirement. On the contrary, it stated that there must be proof "of a reasonable probability that the election may have been 'affected' by an alleged violation of § [401] (e)" (at p. 443). Such a "reasonable probability" was established in *Local Unions 410, etc.*, by proof of the disqualifications, by the fact that one of the disqualified candidates was a "proven vote-getter" who had won in an earlier election, and, as the elections were uncontested, by the absence of significant evidence to the contrary.

In the case at bar, there was overwhelming evidence to the contrary. The undisputed facts were stated by the District Court as follows:

> "By contrast [to the Local 410 case] . . . there was [in the case at bar] a contested election. In this contested election, there was an opposing candidate for the highest union office (President) and an opposing candidate for General Organizer, the second or third most important office in the union. There were eight opposing candidates for Convention Delegate, running in all districts, and three opposing candidates for district offices. Two of the candidates disqualified for general offices (only one of whom was disqualified for lack of prior office experience) were ruled eligible to run, and did run, in all districts for Convention Delegate. The opposing candidates established a campaign headquarters and conducted an apparently vigorous campaign with distribution of leaflets and weekly caucuses and election forums" (A.307).

On the basis of these facts and of the "heavy vote [of 7 to 1] in favor of the administration candidates" the District Court concluded that "the existence and enforcement of the by-law could not have affected the outcome of the election" (*ibid.*).

The Secretary's arguments to establish that "the record does not support [this] . . . conclusion" (Brief, pp. 27-29) are entirely speculative and ignore the overwhelming evidence in the record that even if there had been no disqualifications, the result of the election would have been the same because the members as a whole were well satisfied with the Union's leadership. That evidence fully sustains the findings of the District Court that (A.307-308):

> "Consideration has been given not merely to the effect of the by-law on those disqualified but to its possible effect in discouraging others from coming forward as opposing candidates. Nonetheless the heavy vote in favor of the administration candidates is convincing that the existence and enforcement of the by-law could not have affected the outcome of the election.
>
> "The evidence satisfies me that the primary reason for the heavy vote in favor of the administration was the lack of any real grievance or issue against the union management. The platform of the opposition Membership Party did not charge any abuses or misconduct or even any inefficiency; there was no attempt to state any specific complaints; there was no dramatic or important issue to rouse the membership against the incumbents. The appeal of the opposition was in substance that it could do the same job better.
>
> "The evidence also shows an important further reason for the election outcome. The administration ran candidates for all 372 places as delegates to the Assembly; against them were only 5 opposing candidates and of these only 2 were of the Membership Party. The history of earlier elections shows that when there are only a few candidates opposing a full slate for the Assembly, the opposing candidates are never elected. There is no suggestion that the qualification for Assembly candidacy (one year's membership) was unreasonable. Any substantial rank and file dissatisfaction would have

produced many more opposing candidates for the Assembly than the 5 who actually ran." *

The foregoing findings were made by the District Court after 4 days of trial in which many witnesses testified, including the President of the Union, one of its Business Agents and its Office Manager, as well as the Membership Party candidate who was qualified and ran for General Organizer and one of the Membership Party candidates who had been nominated for Vice President, but was disqualified.** The findings are, in brief, that even if there had been no disqualifications, the result of the election would have been exactly the same. These findings are not to be set aside unless "clearly erroneous" (Fed. R. Civ. P. 52(a); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395, (1947); *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, (1960); *In re Hygrade Envelope Corp.*, 366 F. 2d 584 (2d Cir. 1966)).

It cannot be said that the findings of the District Court as to what in fact happened are "clearly erroneous". Nor is it tenable to say, as the Secretary does, that the District Court "went beyond its proper role in attempting to weigh probabilities" and should have abdicated this fundamental judicial function in the face of a mere possibility which was controverted by overwhelming evidence. Accordingly, the conclusion that the alleged violation did not affect the outcome of the election must be sustained.

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* The Secretary not only dismisses these findings as speculative but goes so far as to state as fact, in direct contradiction to the findings, that "the absence of a contested election for most offices was itself a reflection of a climate in which opposition was discouraged—a climate evidenced by the prior office-holding rule" (Brief, p. 28). The real reason for the lack of contest is explained in the findings of the District Court. The "climate" by which the Secretary seeks to explain it exists only in his imagination. There is nothing in the case to support it.

** So the witness testified (A.124). The Minutes of the Election and Objections Committee indicate he was nominated for Business Agent (A.214).

POINT III

The alleged violations about which no member complained to the Union and which the Union had no opportunity to redress prior to the intervention of the Secretary were properly stricken from the Secretary's complaint and excluded from the case.

The only alleged violation of the Act of which any member of Local 6 complained to the Union was the alleged illegality of the prior service requirement. However, in his original complaint in this action, the Secretary set forth three other violations of the Act, namely:

(1) That the Union failed to give adequate and timely notice to its members of the boundaries of its election districts; (A.4-5)

(2) That the right of the members to vote was subjected to "improper interference" (*ibid.*); and

(3) That certain "offices" which should have been elective were filled by appointment (*ibid.*).

On motion by the Union these additional alleged violations were stricken from the complaint and have been excluded from the case.

The Secretary does not claim that any member made any complaint to the Union about these alleged violations, or exhausted intra-union remedies with respect to them, or compained of them to the Secretary. He does not assert, nor can it be claimed, that the alleged violation of which complaint was actually made to the Union should have put the Union on notice of the other three alleged violations so that it could have corrected them prior to the intervention of the Secretary into its internal affairs. The Secretary's position is simply that as the stricken violations were discovered by him in the course of his investigation and were called to the attention of the Union before the

commencement of this action, so that the Union "had the same opportunities for self-correction that would have followed from an internal union proceeding", such violations may be included in this case.

There is no merit to the Secretary's position.

The pertinent portion of the Act provides:

> "Sec. 402. (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, . . . may file a complaint with the Secretary . . . alleging the violation of any provision of section 401 . . .
>
> • • •
>
> "(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall . . . bring a civil action . . . to set aside the invalid election . . ."

It thus appears on the face of the statute that the Secretary may proceed to vindicate only those violations as to which a union member has exhausted internal union remedies and procedures and made a complaint to the Secretary.

Such a construction is consonant with the general purpose of Congress in enacting the LMRDA not to depart "needlessly from its long standing policy against unnecessary Governmental intrusion into internal union affairs." It is required by the intent of Congress respecting actions under Section 402 as expressly manifested by the following language in the report of the Senate Committee on Labor and Public Welfare:

> "In filing a complaint [with the Secretary] the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a max-

> imum amount of independence and self-government by giving every international union the opportunity to correct improper local elections. If the member is denied relief by the union . . . he may complain to the Secretary".
>
> (S. Rep. No. 187, at p. 21, 1 Leg. Hist. 417).

The question involved here was considered by this Court in *Wirtz* v. *Local Union No. 125,* 389 U.S. 477 (1966). The Court decided there that the Secretary was entitled to maintain an action under Section 402 predicated upon an alleged violation of which no complaint had been made to the union where the union had received "fair notice" of such violation by reason of another complaint lodged with it. The Court held that the Secretary might "include in his complaint at least any § 401 violation he had discovered which the Union had a fair opportunity to consider and redress in connection with a member's initial complaint" (389 U.S. at 484).

But in the case at bar, the Secretary is asking the Court to go much further. He is asking the Court to rule in his favor on the question that was expressly left open in *Local Union No. 125* and to hold that "a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint" (*Id.* at 482).

The Secretary's position makes meaningless all of the language of § 402 requiring the exhaustion of internal remedies. If the integrity and independence of unions can be adequately protected and preserved by waiting until an investigation by the Secretary before giving them notice of alleged election violations and affording them an opportunity to redress them, then the statutory requirement for the exhaustion of union remedies is pointless. Congress might as well have provided that proceedings under § 402 may be instituted with a member's complaint to the Secretary or even on the Secretary's own initiative.

Thus the Secretary's "trigger" theory must be rejected because it conflicts with Congressional policy and nullifies statutory language. Accordingly, as the Secretary makes no claim that the Union in this case had "fair notice" of or "fair opportunity to consider and redress" the stricken violations before the institution of the investigation, those violations were properly excluded from the case.

Afterword

The By-Laws of the Union were amended effective December 6, 1966. The amendments effected the following changes respecting the conduct of Union elections:

1. Executive Board members, who were formerly chosen by the Assembly from among its own members, are now elected by the Union membership as a whole.

2. The prior service requirement for eligibility to run for paid office was amended to add two additional categories of eligibles, namely, (a) persons who have been Department Delegates and (b) persons who have been members of the Union for five years (A.281).

The amendment of the prior service requirement was predicated upon the Union's view that the administration of its affairs is presently sufficiently mature, standardized and well organized that minimum standards for the competency of elected officials can now be adequately assured by permitting Department Delegates and even rank and file members with five years' membership in the Union to be qualified for paid office. Another underlying motive for amending the prior service requirement was the realization by the Union that with the passage of time the pool of available candidates for office diminishes due to attrition by death, age, physical incapacity or other causes. Although

it does not appear in the record, the addition of the two new categories of eligibles not only presently increases the size of the pool of persons qualified as candidates for paid office to more than 16,000, which provides better than 500 eligibles for each office, but also assures an equally large number of eligibles in the foreseeable future.

The Union's next regular general election, which is to be held on May 16, 1968, will be conducted under its By-Laws amended as above set forth. At the time of the writing of this brief, it appears likely that the election will take place while the case is *sub judice*.

The conduct of a new election under the amended By-Law will render academic the existing controversy before this Court which concerns the validity of the 1965 election under the old By-Law. We suggest that in such event this action will be moot. (*U. S.* v. *Alaska Steamship Co.*, 253 U.S. 113, (1920); *St. Pierre* v. *U. S.*, 319 U. S. 41, (1943); *California* v. *St. Pablo & Tulare Railroad Co.*, 149 U. S. 308, (1893)).

We are aware that in *Wirtz* v. *Local 153, Glass Blowers Association*, 389 U.S. 463 (1968), and *Wirtz* v. *Local Union 125*, 389 U.S. 477 (1968), this Court held that intervening union elections did not moot Section 402 actions by the Secretary. The Court's decisions in those cases seem to have been predicated upon the fact that under the circumstances of the cases the "happenstance intervention of an unsupervised election", (389 U.S. at 474), "would immunize a proved violation from further attack and leave unvindicated the interests protected by § 401" (*Id.* at 475). In this connection, it should be noted that the intervening election in *Local 153* was held under the very same by-law that was the basis of the Secretary's attack, so that a holding of mootness would have left the violation unvindicated. In *Local Union 125*, the gravamen of the Secretary's complaint was impropriety in the *conduct* of the

election; and this created a situation where the holding of an unsupervised election would give no assurance that "the unlawfulness infecting the challenged election" had been eliminated.

In the case at bar, on the other hand, there is no charge of misconduct. The only charge is that the 1965 election was conducted under an unlawful by-law. The new election will not be conducted under that By-Law but instead under a By-Law which meets the thrust of the objections to the old By-Law.

Therefore, the election to be held in Local 6 in May under the amended By-Law would not be, in the words of this Court "the intervention of an election in which the outcome might be as much a product of unlawful circumstances as the challenged election . . .", nor would it "immunize a proved violation from further attack and leave unvindicated the interests protected by § 401".

Supervised elections are well adapted to cases of misconduct where impartial supervision should be a sufficient condition to eliminate the evil. They are not appropriate in cases where the only violation alleged is that the election was held pursuant to a by-law which violated § 401, for in such a case impartial supervision of the election is not a necessary nor, indeed, a sufficient condition to achieve the statutory objective. What is needed is a change in the by-law.

Where there is no charge of misconduct as to the manner in which the election was held (as there was in the *Local 125* case), where the allegedly unlawful by-law has been amended so as to eliminate the provision underlying the objection, and where, as may occur in this case, an election is conducted pursuant to the new by-law, it follows that a holding of mootness would be appropriate.

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that either the judgment appealed from should be affirmed or the case should be dismissed as moot.

Respectfully submitted,

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